



PATENT

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

Appellant: Farr et al.

Serial No.: 10/081,575

Filed: February 22, 2002

For: Effervescent Beverage product and Method for Drinking the Same

Group: 1761

Examiner: Robert Madsen

Edgewater, New Jersey 07020

July 25, 2005

BRIEF FOR APPELLANTS

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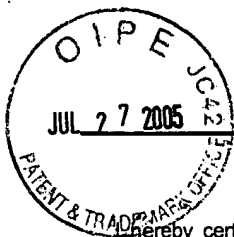
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Respectfully submitted,

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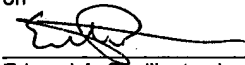
PATENT

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BRIEF FOR APPELLANTS

Englewood Cliffs, New Jersey 07632
July 25, 2005

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I. REAL PARTY IN INTEREST

The Real Party in Interest in this Appeal is Unilever Bestfoods, North America, a corporation of the State of New York.

II. RELATED APPEALS AND INTERFERENCES

Neither the Appellants, their legal representatives nor the Assignee are aware of any other Appeals or Interferences relating to the present Appeal.

III. STATUS OF CLAIMS

This Appeal is taken from the Final Rejection of claims 1-14, the pending claims in the application whereby pending claims 15-21 were withdrawn from consideration by the Examiner. A copy of the appealed claims is attached to this Brief as an Appendix.

IV. STATUS OF AMENDMENTS

No Amendment after the Final Rejection was filed in the Reply Under 37 CFR §1.116 dated May 23, 2005. The Amendment under 37 CFR §1.111 was entered by the Examiner.

V. SUMMARY OF THE CLAIMED SUBJECT MATTER

The invention set forth in the claims on appeal is directed to a pressurized beverage product having a beverage within a pressurized container whereby a soluble gas, sparingly soluble gas or a mixture thereof is dissolved in the beverage. The claimed beverage product has a valve suitable to dispense the beverage to a mouth of a consumer and the container is bagless.

By the presently claimed invention, therefore, a superior beverage product suitable to deliver a smooth and silky sensation upon consumption by a consumer has been prepared. As may be readily gleaned from, for example, Examples 1 and 2 in the specification, the claimed beverage product unexpectedly delivers an excellent tasting effervescent beverage suitable to be directly delivered to the mouth of a consumer.

In the Specification, the portion from page 1, line 7 to page 2, line 9 is background. The phraseology used in claim 1 may be found, for example, on page 4, lines 1-9 and also supported by Figure 1. Beginning at page 11, line 9, working examples, illustrating the unexpected and superior product obtained when making this invention are put forth.

VI. GROUNDS OF THE REJECTION TO BE REVIEWED ON APPEAL

The issues raised in this appeal are primarily ones of fact and of the type normally encountered in connection with rejections made under 35 USC §102(b) and 35 USC §103. In particular, the issues are as follows:

Would one of ordinary skill in the art, upon reading (1) Ash find that claims 1, 2, 5, 7, 10, 11, 12 and 14 lack novelty, and upon reading (2) de la Guardia find that claims 1-4, 11 and 13 lack novelty and upon reading (3) de la Guardia find that claim 6 is obvious and upon reading (4) de la Guardia in view of Atkins et al. find that claims 8 and 9 are obvious?

VII. ARGUMENT

A. Obviousness-Type Double Patenting Rejection

Appellants acknowledge that the terminal disclaimer filed on August 3, 2004 has been entered with respect to Application No. 10/081,483. In view of this, it is acknowledged that the obviousness-type double patenting rejection is moot.

B. Rejection Under 35 USC §112, First Paragraph

The Examiner has in the Advisory Action (Box 5) withdrawn the prior rejection made under 35 USC §112, paragraph 1. Appellants acknowledge that such rejection is now moot.

C. Rejection Under 35 USC §102(b)

The Examiner has maintained the rejection of claims 1, 2, 5, 7, 10, 11, 12 and 14 under 35 USC §102(b) as being anticipated by Ash, U.S. Patent No. 3,063,841 (hereinafter '841). In the rejection, and as already made of record, the Examiner continues to mention, in summary, that the claims of the present application, as amended, are anticipated by column 1, line 60 to column 2, line 2, and column 2, lines 22-70, and column 3, lines 17-21 of the '841 reference. As to claim 14, the Examiner continues to believe that the '841 reference teaches that gas comprises nitrogen and carbon dioxide, and therefore, the composition described in the '841 reference is smooth and silky. In

view of the above, the Examiner believes that the novelty rejection based on Ash is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Appellants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record in the replies under 37 CFR §1.111 and 37 CFR §1.116, the present invention is directed to a pressurized beverage product comprising:

- (a) a beverage with a pressure resisting container, the beverage comprising a soluble gas, a sparingly soluble gas, or a mixture of gases dissolved therein; and
- (b) a valve in a position to seal the container, the valve, when opened, suitable to dispense the beverage as an effervescent beverage to a mouth of a consumer

wherein, internally, the container has a headspace pressurized to less than about 25 bar, gauge, with soluble gas, sparingly soluble gas, or a mixture of gases and further wherein the container does not comprise an expandable bag.

The invention is further defined by the dependent claims, which claim, among other things, that the beverage comprises oxygen, nitrogen or a mixture thereof; that the beverage product is pressurized from about 1.0 bar to about 15.0 bar, gauge; that the beverage product can be juice, tea, coffee, an alcoholic drink, a diet drink, a protein-based drink, soda or pharmaceutical or medicinal drink; that the beverage comprises suspended bubbles and at least 80% of the suspended bubbles have a diameter that is less than about 0.5 mm; that the beverage is liquid-continuous; that the beverage is water-continuous, and that the beverage is smooth and silky upon consumption.

In contrast, and as already made of record, the '841 reference is directed to a method for dispensing liquids under pressure into a drinking vessel so as to ensure a fine, regular and enduring head on the beverage going into the vessel. There is no teaching whatsoever in the '841 reference that suggests that the method of dispensing is geared towards dispensing an effervescent beverage directly into the mouth of a consumer as claimed in the present invention. The '841 reference discloses a dispensing apparatus that is similar to a faucet in a conventional household sink, all of which is attached to a cask or barrel. Taking a drink directly from a household sink would be equivalent to taking a drink directly from the apparatus described in the '841 reference. Again, the present invention, as claimed, is directed to a pressurized beverage product that is suitable to dispense a beverage in effervescent form directly into the mouth of a consumer. Contrary to the Examiner's comments in the Advisory Action, the limitations in claim 1 of the instant application characterize the beverage product as one suitable to dispense beverage into the mouth of a consumer. Such a limitation is a limitation on the beverage product and not an intended use or method limitation as stated by the Examiner.

In view of the above, it is clear that all the important and critical limitations set forth in the presently claimed invention are not found in a single prior art reference, namely the '841 reference. In view of this, it is clear that the rejection made under 35 USC §102(b) is improper and should be withdrawn.

D. Rejection Under 35 USC §102(b)

The Examiner has maintained the rejection of claims 1-4, 11, 13 and 14 under 35 USC §102(b) as being clearly anticipated by de la Guardia, U.S. Patent No. 5,738,254 (hereinafter '254). In the rejection, the Examiner maintains, in summary, that the '254

reference describes an air pressurized effervescent beverage containing 2-liter bottle. The Examiner, believes and mentions that such a bottle is known to be suitable for dispensing into a person's mouth. The Examiner further believes and maintains that the volume occupied for the pressurized effervescent beverage would include 30% up to the fill level of the conventional carbonated beverage bottle. In view of the above, the Examiner believes that the novelty rejection is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Appellants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

Again, and as already made of record, the present invention is directed to a bagless and pressurized beverage product suitable to dispense effervescent beverage directly into the mouth of a consumer.

The invention of claim 1 is further defined by the dependent claims, which claim, among other things, the type of gases or mixture of gases that may be present within the beverage; specific amounts of nitrogen, oxygen and argon within the beverage; that the beverage is liquid-continuous; that the container has a volume from about 30 mm to about 3 liters and the volume is occupied with about 30% to about 96% beverage; and that the beverage is smooth and silky upon consumption.

Again, and in contrast, the '254 reference is directed to a repressurizing beverage device for removable attachment to the threaded neck of a carbonated beverage container. The repressurizing device of the '254 reference comprises a pump 7 which is used to repressurize a beverage container in a rapid and efficient manner, requiring minimal effort. The repressurizing beverage dispenser described in the '254 reference

is cumbersome and meant to preserve carbon dioxide in a beverage, particularly in larger beverage containers so that the beverage will not be discarded when being rendered flat. Moreover, the repressurizing beverage dispenser of the '254 reference is designed so that a lever acts as a counterweight to a handle in order to keep the bottle balanced so that it will not tip over when standing. Clearly, there is no teaching whatsoever in the '254 reference that even remotely suggests a pressurized beverage product that is suitable to be dispensed as an effervescent beverage into the mouth of a consumer as set forth in the presently claimed invention. Again, the teachings of the '254 reference are merely directed to the prevention of carbon dioxide escape in a beverage sold in a bottle which is continuously opened and closed. It is not directed to the dispensing of an effervescent beverage that generates a smooth and silky sensation. This term is clearly defined by the Appellants at page 3 of the specification at lines 1-4. Again, the '254 reference is directed to a device for repressurizing a container. The device in the '254 reference is "fire-extinguisher" like and not even remotely designed to dispense beverage into the mouth of a consumer. In view of this, it is clear that all the important and critical limitations set forth in the presently claimed invention are not found in the '254 reference. Therefore, the novelty rejection should be withdrawn and rendered moot.

E. Rejection Under 35 USC §103

The Examiner has maintained the rejection of claim 6 under 35 USC §103 as being unpatentable over de la Guardia, U.S. Patent No. 5,738,254 (hereinafter '254) as applied to claims 1-4, 11, 13 and 14 above. In the rejection, the Examiner mentions, in summary, that the '254 reference is silent in teaching the beverage has less than 0.5 ppm chlorine. However, the Examiner concludes it is well known to remove chlorine

from water to make carbonated beverages since chlorine is considered a contaminant. In view of this, the Examiner believes that the obviousness rejection is warranted.

Notwithstanding the Examiner's apparent position to the contrary, it is the Appellants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, the present invention is directed to a bagless and pressurized beverage product suitable to dispense effervescent beverage directly into the mouth of a consumer. The '254 reference is directed to a re-pressurizing beverage dispenser for removable attachment to the threaded neck of a carbonated beverage container. The re-pressurizing device of the '254 reference has a pump which is used to re-pressurize a beverage container in a rapid and efficient manner, requiring minimal effort. Nothing whatsoever in the '254 reference even remotely suggests a pressurized beverage product that is suitable to be dispense an effervescent beverage directly into the mouth of a consumer as set forth in the presently claimed invention. Since this is true, and claim 6 depends from independent claim 1, the obviousness rejection is improper and should be withdrawn and rendered moot.

F. Rejection Under 35 USC §103

The Examiner has again rejected claims 8 and 9 under 35 USC §103 as being unpatentable over de la Guardia, U.S. Patent No. 5,738,254 as applied to claims 1-4, 11, 13 and 14 above and further in view of Atkins et al., U.S. Patent No. 3,917,867 (hereinafter '867). In the rejection, the Examiner maintains, in summary, that the '254 reference describes a carbonated beverage but is silent in teaching a pulp free citrus beverage. In an attempt to cure the vast deficiencies of the '254 reference, the

Examiner relies on the '867 reference for describing a solids free orange juice-based beverage that can be made into a carbonated orange juice. In view of this, the Examiner believes that the obviousness rejection is warranted.

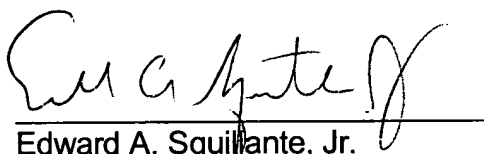
Notwithstanding the Examiner's apparent position to the contrary, it is the Appellants' position that the presently claimed invention is patentably distinguishable from the above-described for at least the following reasons.

As already made of record, the present invention is directed to a bagless and pressurized beverage product suitable to dispense effervescent beverage directly into the mouth of a consumer, a characteristic of the beverage product. Claims 8 and 9 further define the independent claim by characterizing the beverage product as one which can be citrus and free of pulp. In contrast, and as already made of record, the '254 reference is merely directed to a device that prevents carbon dioxide escape in a beverage sold in a bottle which is continuously opened and closed. The container or bottle described in the '254 reference is not designed for direct release of a beverage into the mouth of a consumer. None of the vast deficiencies of the '254 reference are even remotely cured by the '867 reference since the '867 reference merely describes a process for producing a natural orange base by dilution and centrifuging. The combination of references relied on by the Examiner does not, even remotely, describe a beverage product with a beverage that is effervescent and suitable to be dispensed into the mouth of a consumer from the beverage product as set forth in the presently claimed invention. In view of this, Appellants respectfully request that the obviousness rejection be withdrawn and rendered moot.

IX. CONCLUSION

Appellants respectfully request that the Board of Patent Appeals and Interferences reverse the Examiner's final rejection of claims 1-14 for the reasons set forth above.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Edward A. Squillante, Jr.", written over a horizontal line.

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X. CLAIMS APPENDIX

1. (currently amended) A pressurized beverage product comprising:

- (a) a beverage within a pressure resistant container, the beverage comprising a soluble gas, a sparingly soluble gas, or a mixture of gases dissolved therein; and
- (b) a valve in a position to seal the container, the valve, when opened, suitable to dispense the beverage as an effervescent beverage to a mouth of a consumer

wherein, internally, the container has a headspace pressurized to less than about 25 bar, gauge, with the soluble gas, sparingly soluble gas, or mixture of gases and further wherein the container does not comprise an expandable bag.

2. (original) The pressurized beverage product according to claim 1 wherein the beverage comprises oxygen, nitrogen, or a mixture thereof.

3. (original) The pressurized beverage product according to claim 1 wherein the beverage comprises oxygen, compressed air or a mixture thereof.

4. (original) The pressurized beverage product according to claim 3 wherein the compressed air comprises at least 78.0% nitrogen, at least 20.0% oxygen, and less than 2.0% argon.

5. (original) The pressurized beverage product according to claim 1 wherein the pressurized beverage product is pressurized from about 1.0 bar to about 15.0 bar, gauge.

6. (original) The pressurized beverage product according to claim 1 wherein the pressurized beverage product comprises water with less than about 0.5 ppm chlorine.
7. (original) The pressurized beverage product according to claim 1 wherein the beverage is juice, tea, coffee, an alcoholic drink, a diet drink, a protein-based drink, soda, or a pharmaceutical or medicinal drink.
8. (original) The pressurized beverage product according to claim 7 wherein the beverage is a citrus beverage.
9. (original) The pressurized beverage product according to claim 8 wherein the citrus beverage is free of pulp.
10. (original) The pressurized beverage product according to claim 1 wherein the beverage comprises suspended bubbles and at least 80% of the suspended bubbles have a diameter that is less than about 0.5 mm.
11. (original) The pressurized beverage product according to claim 1 wherein the beverage is liquid-continuous.
12. (original) The pressurized beverage product according to claim 1 wherein the beverage is water-continuous.
13. (original) The pressurized beverage product according to claim 1 wherein the container has a volume from about 30.0 ml to about 3.0 liters and the volume is occupied with about 30.0% to about 96.0% beverage.

14. (original) The pressurized beverage product according to claim 1 wherein the beverage is smooth and silky upon consumption.

15. (original) A method for consuming a beverage comprising the steps of:

- (a) contacting an actuator of a pressurized beverage product with a mouth of a consumer; and
- (b) moving the actuator from a resting position to release beverage out of the beveraged product and into the mouth of the consumer, the beverage being effervescent and comprising suspended bubbles wherein at least 80% of the suspended bubbles have a diameter that is less than about 0.5 mm.

16. (original) The method for consuming a beverage according to claim 15 wherein the beverage product has a pressurized headspace and pressure in the headspace changes about in accordance with the ideal gas law wherein:

$$(P_f) = P_i \cdot \frac{T_f}{T_i} \cdot \frac{V}{V + \Delta V}$$

and P_f is headspace final pressure, P_i is headspace pressure before beverage is released, T_i is gas temperature in the headspace before beverage is released, T_f is gas temperature in the headspace after beverage is released, V is volume in the headspace before beverage is released and ΔV is volume of beverage released from the beverage product.

17. (original) The method for consuming a beverage according to claim 16 wherein greater than about 0.05 ml of gas is expelled from the beverage product for about every 1.0 ml of beverage.

18. (original) The method for consuming a beverage according to claim 15 wherein the beverage is juice, tea, coffee, an alcoholic drink, a diet drink, a protein-based drink, soda, or a pharmaceutical or medicinal drink.

19. (original) The method for consuming a beverage according to claim 15 wherein the beverage is:

- (a) smooth and silky, or
- (b) consumed without using at least one hand and a pouring action or a drinking straw and a suckling action, or
- (c) both (a) and (b).

20. (original) The method for consuming a beverage according to claim 15 wherein the beverage is consumed without requiring a hand squeezing action on a container.

21. (original) A method for consuming a beverage comprising the steps of:

- (a) contacting an actuator of a pressurized beverage product with a mouth of a consumer;
- (b) moving the actuator from a resting position to release beverage out of the beverage product and into the mouth of the consumer

wherein the beverage product comprises a container and, internally, the container has a headspace pressurized to less than about 25 bar, gauge, with the soluble gas, sparingly soluble gas, or mixture thereof.

X. EVIDENCE APPENDIX

No evidence pursuant to §§ 1.130, 1.131, or 1.132 are submitted herewith.

XI. RELATED PROCEEDINGS APPENDIX

No decisions rendered by a court or the Board have been made; and therefore, no such decisions are submitted herewith.

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